EMPLOYMENT TRIBUNALS

Claimant: Mr M Kerita

Respondent: BMW (UK) Manufacturing Limited

Heard at: Reading

On: 14, 15, 16, 17, 22 and 23 April 2025 and
(tribunal only) on 9, 12 and 13 June 2025

Before: Employment Judge Hawksworth
Ms J Cameron
Mrs F Tankard

Appearances

For the claimant:	Mr D Bain (solicitor)
For the respondent:	Mr F McCombie (counsel)
Interpreter (Arabic speaking):	Mr A Albdeiry

RESERVED JUDGMENT

The unanimous decision of the tribunal is that:

1. From 25 November 2020, the claimant was disabled within the meaning of section 6 of the Equality Act 2010. From 28 June 2021 the respondent knew that the claimant was disabled.

2. The respondent failed to make reasonable adjustments for the claimant by failing to provide suitable adjusted duties during the period from 28 June 2021 to 15 March 2023. The complaint of failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 succeeds in this respect.

3. The respondent directly discriminated against the claimant by dismissing him on 26 May 2023. The complaint of direct disability discrimination contrary to section 13 of the Equality Act 2010 succeeds in this respect.

4. The respondent discriminated against the claimant by issuing an attendance warning on 19 January 2022. The complaint of discrimination arising from disability contrary to section 15 of the Equality Act 2010 succeeds in this respect.

5. Failing to make reasonable adjustments, issuing an attendance warning and dismissing the claimant amounted to conduct extending over a period which ended on 26 May 2023. These complaints were presented in time.

6. The dismissal of the claimant was unfair. The complaint under section 98 of the Employment Rights Act 1996 succeeds.

7. The claimant was not guilty of gross misconduct justifying his summary dismissal. The complaint of wrongful dismissal/breach of contract in respect of notice succeeds.

8. The claimant's other complaints fail and are dismissed.

9. The claimant's claim having succeeded in part, a remedy hearing will be arranged. Case management orders for the remedy hearing have been sent separately.

REASONS

Summary of claim and response

1. The claimant worked as an assembly associate for the respondent from 1 October 2015 until 26 May 2023 when he was dismissed for gross misconduct. The claimant was dismissed for misconduct during a long period of sickness absence.

2. The claimant said that the respondent failed to make reasonable adjustments and subjected him to discrimination because of a disability and things arising from a disability contrary to the Equality Act 2010. He also complains of unfair and wrongful dismissal.

3. The respondent defended the claim. It said that during his period of sick leave, the claimant fraudulently claimed company sick pay, amounting to gross misconduct which justified summary dismissal. This was based on covert surveillance of the claimant carried out on behalf of the respondent.

Hearing and evidence

4. The liability hearing took place on 6 days from 14 to 23 April 2025 at Reading tribunal.

5. We had a hearing bundle which had 1,200 pages. References in these reasons to page numbers are to the main bundle.

6. We were provided with 19 short video recordings of the claimant made covertly on behalf of the respondent which we watched before the start of the evidence, at the invitation of the parties.

7. The claimant made 18 audio recordings of various meetings and appointments. The recordings were made covertly. There were lengthy discussions before and at the hearing about some AI-produced transcripts of the audio recordings. Some of the issues arising from these transcripts are explained in our case management

orders made on 15 April 2023. In short it seemed likely that most of the transcripts would not be of direct relevance to the issues for us, and we agreed that we would read the highlighted parts of the transcripts only, which were referred to in the claimant's witness statement.

8. By the third day of the hearing some issues had arisen about the quality of the highlighted parts of the transcript. They were not easy to follow, for example it was not always apparent who was speaking.

9. Given the large number and length of the recordings, and the dispute about their relevance, we wanted to take as proportionate and pragmatic an approach to the transcripts as we could, and avoid delay if possible. We made case management orders for the parties to revisit and try to agree the highlighted parts of the transcripts. We hoped that it would not be necessary for the tribunal to listen to the recordings to resolve any disputes with the transcripts. We took a break from the evidence on the morning of day 4 to allow the parties to work on the transcripts. The parties were able to reach an agreed position on the transcripts which was helpful. In the event, the transcripts were, as anticipated, of limited relevance to the issues for us.

10. The parties' witnesses had all produced written witness statements.

11. The hearing timetable is below, and this records when we heard from the witnesses.

Day 1		Tribunal reading and preliminary matters
Day 2		Claimant's evidence
Day 3	am pm	Claimant's evidence Respondent's evidence: Luke Jones
Day 4	am pm	Parties working on transcripts Amy Reed
Day 5		Richard Darvill Akhil Patel
Day 6		Akhil Patel Wayne Smith Gerry McCabe Tim Coleman

Closing submissions and deliberation

12. There was not enough time for the tribunal to hear oral closing submissions from the parties, or for the tribunal to deliberate and make its decision. The parties agreed to make closing submissions in writing. The parties exchanged written closing submissions by email on 1 May 2025 and written replies to the other party's writing closing submissions by email on 8 May 2025.

13. The tribunal met in private to make its decision on 9, 12 and 13 June 2025.

Issues

14. The issues for determination were discussed at a preliminary hearing following which the parties worked together to produce a draft list of issues. The final list of issues was discussed at a preliminary hearing on 5 March 2025. The judge made a decision about a remaining area of dispute between the parties, and approved the final list of issues.

15. At the start of the hearing before us, Mr Bain confirmed that the complaint of failure to make reasonable adjustments is put in the alternative on the basis of physical features in relation to PCP1, but not PCPs 2 or 3. The physical features said to disadvantage the claimant are the physical requirements of the roles listed at paragraph 7.1.1 of the list of issues.

16. The final list of issues for the liability hearing is included in an appendix below.

Findings of facts

17. This section of the judgment explains what we have decided happened in the claimant's case.

18. We include undisputed facts here as far as they help us to understand the chronology and make our decision about the claim. Where the parties disagree about what happened, we decide, by reference to the evidence that we heard and read, what we think is most likely to have happened.

Introduction

19. The claimant started working for the respondent as an agency worker in 2007. He began employment with the respondent on 1 October 2015.

20. The claimant worked in the respondent's factory as an assembly associate grade 2. The work is physically demanding. Because of the physical nature of the work, the respondent has a contract with Nuffield Health to provide on-site physiotherapists. They treat associates and also provide reports to management. We refer to them as the respondent's physiotherapists.

21. Associates are usually rotated between jobs during one shift. This is known as job rotation. Jobs are also referred to as roles, tasks or processes. The normal process was that associates would rotate through three roles during one shift, swapping roles with their colleagues. This reduces the risk of employees having repetitive strain injuries. The respondent's practice was that associates should be able to perform as many job roles as possible, and it generally aimed for employees to be able to carry out a minimum of four job roles. This allows the respondent flexibility to roster staff efficiently, for example to cover other employee absence.

22. The background to the claimant's claim was the requirement for him to train on additional tasks.

Back pain in 2017

23. On 12 March 2017 the claimant developed severe back pain after being asked to trial a new task at work ('wipers'). At this time he was working on line 60. He had an out of hours appointment to see a doctor (page 267). He was signed unfit for work with 'mechanical back pain' from 12 March to 21 March 2017 (page 269).

24. By 20 March 2017 the claimant's back was much better and he felt able to return to work. He saw a physiotherapist at work.

25. The claimant had another period of sickness absence which started on 24 July 2017 with tonsilitis and low back pain (page 713). He had a face to face assessment with occupational health (OH) on 25 July 2017 (page 275). The OH advisor was not asked and did not comment on whether the claimant had a disability under the Equality Act.

26. The claimant saw his GP regarding back pain in August 2017, November 2017 and January 2018. He had physiotherapy and was given exercises. He had some pain but it was manageable. He saw his GP about back pain once between 8 January 2018 and July 2020, on 26 September 2019 (page 708). He did not take any time off work in this period. He was prescribed medication for his back pain on one occasion in 2018 (page 712). He did not tell us that his back pain had any impact on his day to day life at this time.

Back pain in July 2020

27. On 6 July 2020 the claimant was asked to train on a new task ('coolant on'). He began to experience back pain. He went to see his GP on 15 July 2020. The GP said this was a 'flare up' of low back pain due to work activities. He gave the claimant a certificate which said that he may be fit for work with adjustments during the period 15 July 2020 to 15 October 2020 (page 289). The GP recommended amended duties and workplace adaptations.

28. The claimant returned to work on 23 and 24 July 2020. He experienced back pain on these days. After this the claimant did not return to work until 7 September 2020 because of the respondent's annual shut down and annual leave.

Back pain in September 2020

29. During the period 7 September 2020 to 6 October 2020 the claimant was at work and was asked to trial some new tasks. He found they caused him pain. On 14 September 2020 the claimant's GP provided a fit note that said the claimant was fit for work with amended duties and workplace adaptations. The fit note said the claimant was back to heavy duties and asked if he could be appropriately managed through OH/physiotherapists (page 315). On 15 September 2020 the physiotherapist provided advice that the claimant should remain on his normal duties (page 316). On 18 September 2020 the claimant was in pain at work and went to the hospital (page 318).

30. From 21 September 2020 the claimant worked his normal duties. On 24 September 2020 he told his GP he was still very much struggling with back pain and was given prescription painkillers (page 706).

31. The claimant was asked to trial 'coolant on' again from 29 September 2020 to 6 October 2020. When he protested about this, Richard Darvill, an absence manager, told the claimant that the respondent could not just take an associate's word for it that they have a back problem, and they can only take this more seriously when they have a medical report with an MRI scan.

32. After returning to the 'coolant on' trial, the claimant's back pain became worse again. He went to hospital during his night shift on 6/7 October 2020 (page 329). He was in touch with his GP on 24 September and was signed off sick by his GP on 8 October until 30 October 2020 (page 333 and 705). The GP recorded that a further relapse in low back pain had been triggered by a return to heavy duties despite previous advice against this (page 706).

33. During this period the claimant had regular appointments with the respondent's physiotherapists regularly. The claimant had signed a form giving consent for the respondent's physiotherapists to send reports to his line managers. He ticked a box to say that he would like to see a copy of each report at the time it was sent to the managers. The physiotherapists also carried out line visits where they went to the assembly hall to assess the suitability of various tasks for the claimant, and made reports for the claimant's managers.

Move to line 50 in November 2020

34. The claimant returned to work on 2 November 2020 to a new line (line 50). He trialled three new roles in November, all of which he had to stop because of the pain (pages 348, 352, 363).

35. The claimant was off work sick from 25 November 2020 to 2 February 2021 (page 368 and 379). An attempted return to work on 18 January 2021 was unsuccessful.

36. During this time, the claimant regularly saw the respondent's physiotherapists and they continued to carry out line visits to assess the suitability of tasks on line 50 for the claimant.

37. On 30 November 2020, with the claimant's permission, one of the respondent's physiotherapists spoke to the claimant's GP (page 704).

Move to cockpit roles in February 2021

38. On 3 February 2021 the claimant returned to work and moved to cockpit, a new area. He successfully trained in three cockpit tasks (steering column, steering knuckle and heads up display). He increased his painkillers to help him manage the roles.

39. On 16 February 2021 the claimant attended a sickness absence meeting with his line manager Amy Reed. The claimant was given counselling and told that he could be subject to disciplinary action in the event of a recurrence (page 397). Although the meeting was referred to as disciplinary meeting, it was an informal sickness absence meeting. The counselling provided addressed the claimant's sickness absence issues, not disciplinary issues. This was the informal stage of the respondent's sickness absence procedure.

40. The claimant's GP had referred him to the NHS specialist spinal surgery unit and the claimant saw a specialist physiotherapist on 17 February 2021 (page 399). An MRI was recommended. This took place on 15 April 2021. It showed that the claimant has a right paracentral disc protrusion at L5-S1 with impingement of the right traversing S1 nerve root. He was treated with a nerve root block injection on 28 April 2021 (page 402).

41. In May 2021 the claimant was asked to train on a fourth task. The new task was in section 1. The physiotherapist had advised that this task was not ergonomically suitable for the claimant (page 376). The new task caused the claimant to have right shoulder pain, a new issue. He saw his GP who certified that he was fit for work on amended duties from 19 May 2021. The GP asked if the claimant could be moved to an alternative position (page 405).

42. By 1 June 2021 the claimant was back at work in the three roles he had been doing on cockpits but he was still experiencing back pain. He saw his GP on 17 June 2021 (page 701). The claimant's GP provided a letter explaining that the claimant had ongoing back pain (and newer right shoulder pain) and asking that both conditions be considered in work assessments (page 413).

<u>OH referral in June 2021</u>

43. The claimant gave his line manager a copy of his GP's letter. The respondent referred the claimant to OH (page 414). The OH advisor's report was dated 28 June 2021 (page 424). It said that aspects of the claimant's role 'seem to be exacerbating long-standing back issues'.

44. In response to a question about whether any adjustments were needed, the advisor said:

> "I understand that lighter duties have previously been recommended by the physiotherapist. I would concur with this but would advise a workplace assessment in order to ascertain what duties can be undertaken."

45. In response to a question about whether the employee was likely to be covered by the Equality Act, the advisor said:

> "This is a legal question, and I can only give an opinion, which is that Mr Kerita is likely to fall under the Equality Act 2010... Ultimately it is for the Courts to make this decision."

46. We pause in the chronology here to set out some findings about alternative duties. The respondent does not use the terms light duties or lighter duties. However, the respondent's witnesses agreed with the claimant (and we accept) that there are some roles which are less strenuous than others. The claimant identified some roles in the rework area. This is a less time pressured area than assembly. In assembly, one car is produced off the line every 60 seconds. Once the cars reach the rework area, that volume is split into three separate lines (so the work is around a third of the speed of the assembly line).

47. The respondent agreed that some of the roles the claimant identified in the rework area would have been suitable for him: i) drive outside from end of line, ii) key programming iii) pick to light area and iv) picking books, making tool kit and ecu job. We accept that these were lighter roles which the claimant could have performed.

48. We find that the claimant's managers did not consider these roles as possible alternative duties for the claimant.

49. The respondent said that these roles were already filled with other medically restricted individuals. We did not have evidence supporting this. Mr Darvill, an absence manager for the respondent, estimated that the respondent has around 10 permanent staff with medical restrictions out of around 1,800.

50. Returning to the chronology, on 1 July 2021 the respondent's physiotherapist and the claimant's managers carried out a line visit to identify appropriate roles for the claimant (page 426). The focus of that visit was not, as the OH report had advised, to identify lighter duties for the claimant. Instead, the focus of the visit was to identify a fourth task that the claimant could perform in addition to the three he was doing. The report said that 'in order to have a full rotation, [the claimant] is required to be trained on one further process'.

51. The claimant continued to work on the three cockpit tasks he was doing in June 2021. On 26 October 2021 he had another assessment with one of the respondent's physiotherapists (page 433) who reported that the claimant was taking painkillers to manage his pain levels and had been referred to a spinal specialist. He said that the claimant should remain on his usual three processes until his spinal specialist review.

52. The claimant visited his GP in November and December 2021 about the ongoing low back pain he was experiencing.

<u>Further absence in December 2021 and the absence warning</u>

53. On 3 December 2021 the claimant was at work when he felt a terrible pain in his back. He was signed off sick by his GP from 6 December 2021 to 27 December 2021 with back pain (page 443).

54. The claimant had an appointment with one of the respondent's physiotherapists on 20 December 2021. The report following this appointment said that the claimant had ongoing lower back pain which had worsened recently. It also said that the claimant was happy to continue working on the three cockpit processes which he had been doing (page 451). We accept the claimant's evidence that he did not say this, because it is consistent with the physiotherapist's notes of the appointment; these record the claimant as saying he felt 'current work duties aren't helping' (page 795). We also accept the claimant's evidence that the respondent's physiotherapist raised the possibility of a move to a new area: this is also included in the physiotherapist's notes (page 796). However, the report did not mention a possible move and only said that the claimant should continue to work on the three cockpits processes for January and February 2022 (page 451).

55. The claimant returned to work on 4 January 2022, after the Christmas shutdown.

56. The claimant was required to attend an absence review meeting on 19 January 2022 (page 452). The claimant's most recent sickness absence in December 2021 was the prompt for this meeting. The meeting was described as a disciplinary hearing but was in fact an absence management meeting. It was described as a stage 2 meeting, but the claimant's line manager confirmed at the start of the meeting that it was actually a stage 1 meeting, the previous meeting in February 2021 having been an informal meeting only.

57. At the meeting, the claimant's line manager told him that the meeting concerned sickness absence in 2020 and 2021 (page 459). Mrs Reed made clear that the respondent did not question the reasons for the claimant's absence (page 460). After an adjournment, Mrs Reed issued the claimant with a first formal discussion letter, an absence warning with a 12 month review period (page 463). She said this was for the last three absences (page 461). This included the most recent absence, the claimant's absence for back pain in December 2021.

58. The claimant appealed against the absence warning.

59. The claimant's GP wrote a letter supporting the claimant on 1 February 2022 (page 472). He expressed confusion and concern about the claimant's situation at work. He said recommendations by him and by the respondent's physiotherapists to alter the claimant's duties/station at work had been 'incompletely adhered to and/or possibly entirely ignored at times'. He said that rotating the claimant to more demanding roles had 'inevitable consequences'. He suggested some investigation and liaison with OH to 'ensure that this continued cyclical situation can be resolved'.

<u>Absence warning appeal – April 2022</u>

60. The appeal against the absence warning took place on 21 April 2022. It was heard by Wayne Smith. The claimant said that his back pain was causing his absence and he wanted the respondent to find a more suitable role than the three roles on cockpits. Mr Smith, the appeal manager, said that the claimant had already been tried on about 12 tasks when normally the limit was 5. He said the respondent was 'getting to the end of the line'. Akhil Patel, the HR manager at the hearing, said the respondent had 'bent over backwards'.

61. This summarises the view of the respondent's managers towards the claimant. They felt that as so many different tasks on the assembly line had been considered for the claimant, they had gone far enough. They did not think about whether his back condition was preventing him from working on any role on the assembly line and whether they should consider roles in another area, for example make up or rework.

62. Mr Smith upheld the decision to issue an absence warning (page 482).

63. On 12 May 2022 a representative of the claimant's trade union emailed the respondent to say that the claimant was still suffering with pain in his back (page 483). He asked the respondent to 'consider giving him one last trial in the hope we

can find him some work to do that will help him cope with his condition'. The claimant did not receive any response to this request.

64. At around the same time the claimant sent HR a copy of a letter from his physiotherapist at the hospital dated 19 May 2022 (page 485). The letter said that limited progress could be made with physiotherapy because the claimant's job continued to flare up his pain. The letter said that it was unlikely that the claimant would make any progress if he continued to flare-up his symptoms at work.

65. On 31 May 2022 the respondent's physiotherapist recommended that the claimant was clinically fit to work on the three tasks in cockpits, and that he be trialled on a fourth task called panel fit (page 491).

66. At a meeting with the respondent's physiotherapist on 7 July 2022, the claimant said that he had ongoing issues with pain (page 822). Another meeting was arranged with the same physiotherapist and his manager. This took place on 12 July 2022. The claimant said he had constant pain in his lower back. Following the meeting the manager provided a report to the respondent (page 493). In the report he said that the claimant's current cockpit tasks were the most ergonomically suitable for the claimant to undertake. He also said it was unlikely that the claimant would be covered by the Equality Act. This was contrary to the advice the respondent had had from its OH advisor.

Incident at work in August 2022

67. On 24 August 2022 while at work manoeuvring a large metal wheel, the claimant experienced a severe pain in his lower back, felt dizzy, vomited and as a result fell or slumped to the floor. He was taken to hospital by ambulance (page 505).

68. The claimant was signed off sick by his GP the following day (page 506). A covid test which was carried out at the hospital on 24 August came back positive (page 693).

69. The claimant did not return to work after this incident.

Absence review meetings from September 2022 to February 2023

70. An absence review meeting took place on 9 September 2022 with Mr Darvill, the absence manager for the claimant (page 510). Mr Darvill said there were no roles for the claimant. The note of this meeting recorded that the claimant said he had 'difficulties walking' (page 511).

71. The claimant had an appointment with the respondent's physiotherapist on 23 September 2022. The possibility of two jobs in 'make up' was raised.

72. On 3 November 2022 the claimant's GP wrote another letter in which he asked the respondent to make efforts to allow the claimant a safe return to an appropriate role. He said he was unclear why it had seemingly been impossible to find a station or role which did not put his back under less stress (page 533).

73. Another absence review meeting took place on 10 November 2022 with Mr Darvill (page 540). The claimant said he would not be able to return to cockpits but could

return to a more suitable role. The note of the meeting said the claimant said walking was slow and could be painful. He said he could walk about 1-2 miles, and after 100m the pain got worse. He said he would go for small walks.

74. The claimant's company sick pay expired on 12 November 2022 (page 528).

75. On 29 November 2022 the claimant had an appointment with the respondent's physiotherapist (page 830). The note of the meeting said that the claimant said that he had pain walking 20 metres and felt dizzy and light headed.

76. On 10 January 2023 the claimant had another appointment with the respondent's physiotherapist (page 550). The report of the appointment recorded that the claimant had said that walking was limited to 20-30 metres, then feeling sick and dizzy with pain in the back and right leg. It reported that the claimant had managed 'plinth sitting' for approximately 2 minutes. The physiotherapist recommended that the claimant was not clinically fit to work at present due to pain and reduced range of movement in the low back. It said he was currently also signed off by his GP and was awaiting a review with the chronic pain specialists. The make up roles were discussed again and the claimant said if they were suitable, he would try them.

77. Another absence review meeting took place on 26 January 2023 with Mr Darvill (page 560). The claimant said he could return to a more suitable role. He asked about the make up roles which the physiotherapist had mentioned at appointments in September 2022 and January 2023. The note of the meeting said the claimant said it was very difficult to walk and sit, as these caused pain. He said pain increased if he walked 5 to 10 minutes. He said he struggled with walking.

78. In February 2023 the claimant was seen by the pain management clinic. The consultant's letter of 24 February 2023 recorded that there was a 'significant secondary primary [sic] pain experience due to anxiety, depression and work pressures' (page 566). It said there was no cure and the claimant's pain would have to be managed. It said that the claimant's mechanical low back pain had taken on more significance due to psychosocial factors (page 570).

79. The claimant's statutory sick pay entitlement expired on 12 March 2023 (page 564).

<u>The respondent's suspicions about the claimant in March 2023</u>

80. On 2 March 2023 one of the respondent's physiotherapists emailed Mr Darvill to say that the claimant had been signed off work by his GP for another two months (page 573). He also said that the claimant had been seen by the pain management specialist at the hospital and would be starting an assignment with a pain rehabilitation team on 13 March 2023.

81. A little later the physiotherapist had a discussion with Mr Darvill. The physiotherapist said that nothing seemed to be working and he would have expected the claimant to be back at work by this point. The physiotherapist said he could not explain the level of pain the claimant was experiencing and why he remained unfit for work. He said he thought there were some inconsistencies, for example the recent 2 minute plinth sit appeared to be inconsistent with what the claimant was saying about being unable to sit still.

82. The physiotherapist had not raised any of these concerns with the claimant or obtained his consent to discuss his case with one of his managers.

83. The discussion with the physiotherapist raised suspicions with the claimant's managers. Mr Patel and Mr Darvill decided to instruct G4S to carry out surveillance of the claimant (page 574). This was a highly unusual step. Mr Darvill was aware of it happening around 3-4 times in his 12 years with the respondent.

84. The claimant attended a physiotherapy appointment on 10 March 2023 (page 812). At the appointment the claimant said he could walk for 5 minutes then had pain and felt sick.

85. Another absence review meeting took place on 15 March 2023 with Mr Darvill (page 586). The claimant said he could return to a more suitable role. He asked about 'make up' roles which the physiotherapist had mentioned at appointments in September 2022 and January 2023. The note of the meeting said the claimant said the pain was always there when walking and that he could walk for 10-15 minutes.

86. After the absence review meeting on 15 March 2023, a G4S surveillance operative followed the claimant and then carried out further surveillance of the claimant the following day. G4S provided a report to the respondent (page 594). They filmed the claimant from behind and showed him walking approximately 3 miles over a period of approximately 1.5 hours. At one point the film showed claimant bending down once to examine the side of a car. The report said that there was no indication whatsoever that the claimant had lower back, leg or shoulder pain or was experiencing sickness or dizziness. None of the films, which were presented in short clips, showed the claimant's face.

87. We find that the claimant's managers made assumptions about what the claimant had told them about his ability to walk. They formed the view that he had said he was unable to walk for more than 20-30 metres. They saw the G4S surveillance film as contradicting what he had told them. In fact, the claimant had regularly told the respondent at physiotherapy appointments and at absence management meetings that he experienced pain, sickness or dizziness after walking for some time, not that he was unable to walk.

88. On 20 March 2023 Mr Darvill approached Mr Smith, a more senior manager, to obtain additional funding for further surveillance of the claimant. The purpose of the further surveillance was 'to ensure [a] robust outcome' (page 590). In the event no further surveillance was carried out.

89. On 11 May 2023 the claimant had his last appointment with the respondent's physiotherapist. The physiotherapist carried out some physical testing. He did not challenge the claimant's account of his pain. Mr Jones' evidence to us, which we accept, was that up to the end of the claimant's employment, the respondent's physiotherapists assessed him as unfit for work and accepted his reports of pain. At no time did the physiotherapists disagree with the view of the claimant's GP that the claimant was not fit for work.

<u>Disciplinary hearing in May 2023</u>

90. On 19 May 2023 the claimant was invited to a disciplinary hearing (page 608). He was told the reasons for the hearing and these included that he had fraudulently claimed company sick pay and had unacceptable levels of absence. The claimant was provided, through his union, with a copy of the G4S investigation report and 11 of the 19 short video clips referred to in the report.

91. The claimant attended the disciplinary hearing on 26 May 2023 (page 611). The hearing was conducted by Gerry McCabe, a group leader in assembly.

92. The hearing was a disciplinary hearing to consider allegations of misconduct against the claimant. The respondent was not considering the claimant's sickness absence.

93. The claimant's union representative said that the claimant had not said that he could not walk, he had said he had pain whilst walking and that the longer he walked the more pain he was in (page 612). The claimant's representative said that the videos did not show the claimant's face and that the investigator who had suggested that the claimant showed no signs of pain was not medically qualified.

94. The HR representative was asked whether the claimant was in receipt of sick pay at the time of the video. He said, incorrectly, that he was (page 614).

95. The claimant said that he had been in the wrong area, he needed light duties and his managers had told him there were no light duties and had sent him home.

96. During an adjournment Mr McCabe obtained an email which had a summary of the respondent's physiotherapist's view of the surveillance films (page 620). It said:

> "[We] were asked to clinically review the footage, we concluded that: Following 2.97 miles Mohamed did not have any signs of antalgic, painful gait pattern. No stopping was observed for rests or breaks. And no signs of pain or destress was observed from the footage seen."

97. We find that it would have been difficult to fully assess pain from the footage seen because it was only shot from the back. There was no footage of the claimant's face.

98. After the hearing restarted, Mr McCabe read this email out and invited the claimant's union representative to comment on it. He responded to the claimant's complaint about suitable roles.

99. At the end of the meeting, after another adjournment, Mr McCabe said that he had decided to dismiss the claimant for gross misconduct, including fraudulent claim of company sick pay and unacceptable levels of absence.

100. The termination of the claimant's employment with immediate effect was confirmed in a letter dated 26 May 2023 (page 621). This said the dismissal was for gross misconduct and gave the same reasons as the letter inviting the claimant to the hearing.

101. The dismissal letter said, "The outcome of this hearing is to terminate your contract of employment with immediate effect from Friday 26 May 2023." The letter

told the claimant he had the right of appeal. It did not say that he would be reinstated or his employment revived pending any appeal. It did not say that he remained subject to his terms and conditions of employment pending any appeal.

102. The claimant appealed against the decision on 26 May 2023 (page 623).

103. The appeals procedure was set out in the collective agreement between the respondent and the claimant's union (page 251). It said:

> "Dismissals will not be implemented prior to the appeal being completed. Associates will remain on full basic pay pending their appeal."

104. The respondent did not tell the claimant when he appealed that he would be employed pending his appeal, or that he remained bound by the terms of his contract during this time.

105. The claimant did not receive his basic pay pending his appeal. He received pension contributions and bonus payments between 26 May 2023 and 20 July 2023.

<u>July 2023 - appeal</u>

106. In his appeal the claimant said he hadn't ever said he couldn't bend, and the bending shown on the video was not the same as a 7/8 hour shift of bending on a very quick operation on the line. He said the video did not show how much pain he was in. He said he had been advised to keep walking and had been advised by the pain management clinic to live with the pain, which meant he had to push himself to do daily tasks.

107. On 7 June 2023 the claimant emailed HR to say he would be away from Oxford dealing with a personal family issue and that he would inform the respondent when he returned. He said he could be contacted by email. The respondent acknowledged the claimant's email and said the information had been passed to the local HR team (page 629). During this time the claimant was out of the country dealing with a family issue.

108. The respondent sent an invitation to an appeal hearing to the claimant's home address by post. He did not receive it because he was not at home, as he had told the respondent. The appeal hearing took place on 12 July 2023, the claimant did not attend because he was not aware of it. His union representative prepared a statement for the appeal but the claimant had not approved or checked it (page 640).

109. The appeal hearing was rescheduled for 20 July 2023 and the invitation letter was sent to the claimant's home address by post on 12 July 2023 (page 643). The claimant was still away dealing with a family health issue. He did not receive the letter. It was emailed to him on 18 July 2023. He was unable to open the attachment. He replied to the email saying he was unable to make it as he had an appointment (page 648). There was further correspondence about that. The respondent's HR officer said the claimant had left the country without the

respondent's permission (page 647). The claimant sent a medical certificate dated 20 July 2023 in French (page 663).

110. The appeal hearing went ahead in the claimant's absence. His dismissal was upheld. The respondent wrote to the claimant on 21 July 2023 to confirm the outcome of the appeal hearing (page 664). The letter says:

> "The outcome of the hearing is to uphold the original decision made on 26.05.2023.
>
> You do have the right as an individual to apply to industrial tribunal and you have to do this within 3 months minus 1 day, from your original hearing."

The impact of the claimant's back pain

111. We accept the evidence of the claimant that he had episodes of back pain in 2017 but his back pain was then well controlled until 6 July 2020. We accept that his back pain was ongoing and worsening after 6 July 2020. This is consistent with the medical records we have seen.

112. We accept the claimant's evidence of the effect of his back pain on his day to day activities in the claimant's impact statement. This was not challenged by the respondent (page 35). We accept that the effects of the claimant's back pain included the following:

112.1. When cooking he must stop and sit to rest;
112.2. When cleaning he has to stop because of the severe pain he endures when bending down;
112.3. If he sits for long periods of time he has to get up and move about;
112.4. He has difficulty lifting shopping bags.

113. The claimant's NHS physiotherapist recorded in a letter dated 25 November 2020 that the claimant's symptoms, including symptoms of mechanical back pain, were having a significant effect on his daily life and employment (page 369). We find that these effects were likely to have been those described by the claimant in his impact statement.

114. The claimant's GP in a letter dated 15 May 2024 said that the claimant's back pain was having a daily impact on his life and significantly limiting his activities of daily living. He said it had started in 2017 and that the claimant had been increasingly debilitated by the pain over the 7 years since.

The claim

115. The claimant notified Acas for early conciliation on 5 August 2023 and the Acas early conciliation certificate was issued on 16 September 2023. The claimant presented his claim to the employment tribunal on 12 October 2023.

The law

Unfair dismissal

116. Section 98 of the Employment Rights Act 1996 says:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it—*
>
> *…*
>
> *(b) relates to the conduct of the employee…*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

117. In a complaint of unfair dismissal where the reason for the dismissal is conduct, the role of the tribunal is not to examine whether the employee is guilty of the misconduct. The employer must show that, at the time of the dismissal, it believed the employee to be guilty of misconduct (*British Home Stores v Burchell* [1980] ICR 303).

118. If the respondent establishes conduct as the reason for dismissal, the tribunal goes on to consider, applying a neutral burden,

118.1. whether, at the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and

118.2. whether, at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances and

118.3. whether the decision to dismiss and the procedure adopted by the employer were within the range of reasonable responses open to the employer.

119. The tribunal must not substitute its own view of the appropriate penalty for that of the employer.

Breach of contract/wrongful dismissal

120. The Tribunal has jurisdiction to consider a complaint of breach of contract under Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. This includes a complaint that a summary dismissal was a wrongful dismissal (that is a dismissal without notice in circumstances where the employer was not entitled to dismiss without notice).

121. In relation to a breach of contract claim concerning a failure to give notice of dismissal (wrongful dismissal), the approach here is not the same as in a complaint of unfair dismissal. In a case of wrongful dismissal, the tribunal must decide whether:

121.1. the claimant actually committed the misconduct; and

121.2. the misconduct was of a sufficiently serious nature to amount to a repudiatory breach justifying summary dismissal.

Disability

122. Disability is a protected characteristic under sections 4 and 6 of the Equality Act 2010. The burden of proof is on the claimant to establish that she has a disability within the meaning of the Equality Act 2010.

123. The definition of disability is contained in section 6 of the Equality Act:

"(1) A person (P) has a disability if:

(a) P has a physical or mental impairment; and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

124. Substantial means more than minor or trivial (section 212).

125. Schedule 1 to the Equality Act sets out additional detail concerning the determination of disability. In relation to long-term effects, paragraph 2 of schedule 1 provides:

"(1) The effect of an impairment is long-term if –

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if the effect is likely to recur."

126. When considering whether an effect is long-term, the question is whether there has been a substantial adverse effect as at the date the alleged discriminatory acts occurred or if not, whether as at that date, there was a substantial adverse effect which was likely to last 12 months (*Tesco Stores Ltd v Tennant* [2020] IRLR 363 EAT).

127. Paragraph 5 of schedule 1 deals with the effect of medical treatment. It says:

> *"(1) An impairment is to be treated as having a substantial effect on the ability of the person concerned to carry out normal day-to-day activities if –*
>
> *(a) measures are being taken to correct it, and*
>
> *(b) but for that, it would be likely to have that effect.*
>
> *(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid."*

Direct discrimination

128. Section 13(1) of the Equality Act says:

> *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

Discrimination arising from disability

129. Section 15(1) of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if:

> *"(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."*

130. Section 15(2) says that:

> *"Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

131. In *Pnaiser v NHS England and anor* 2016 IRLR 170, the EAT summarised the approach to be taken under section 15:

131.1. The tribunal must identify whether there was unfavourable treatment and by whom.

131.2. It must determine the cause of or reason for the treatment, focusing on the conscious or unconscious thought processes of the alleged discriminator.

131.3. There may be more than one reason or cause for the treatment and, as in a direct discrimination case, the 'something' need not be the main or sole

reason for the treatment but it must have at least a significant (more than trivial) influence so as to amount to an effective reason for or cause of it.

131.4. The tribunal must determine whether the reason or cause (or a reason or cause) is something arising in consequence of the claimant's disability. That is an objective question and does not depend on the thought processes of the alleged discriminator. The expression 'arising in consequence of' could describe a range of causal links, for example it could include more than one link.

131.5. If an effective reason or cause is 'something arising in consequence of' the claimant's disability, the tribunal will consider whether the respondent can show that the treatment is a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

132. The Equality Act imposes a duty on employers to make reasonable adjustments. The duty comprises three requirements, in this case, the second requirement is relevant. This is set out in sub-section 20(4):

> *"The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

133. In relation to the second requirement, s 20(9) of the Equality Act provides that reference to avoiding a substantial disadvantage includes reference to:

> *"(a) removing the physical feature in question,*
> *(b) altering it, or*
> *(c) providing a reasonable means of avoiding it."*

134. The third requirement is also relevant. This is set out in sub-section 20(3):

> *"The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

135. Paragraph 20 of schedule 8 of the Equality Act says that an employer, A, is not subject to a duty to make reasonable adjustments:

> *"if A does not know, and could not reasonably be expected to know –*
>
> *…*
>
> *(b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."*

136. The EHRC Code of Practice describes the duty to make reasonable adjustments as:

> *'a cornerstone of the Act which requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled*'.

137. The Code says that transferring a disabled worker to fill an existing vacancy is a step which it might be reasonable for employers to have to take as a reasonable adjustment (paragraph 6.33). It gives the following example:

> *"An employer should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the worker to continue doing the current job. Such a post might also involve retraining or other reasonable adjustments such as equipment for the new post or transfer to a position on a higher grade."*

138. In *Archibald v Fife Council* [2004] ICR 954, explaining the duty to make reasonable adjustments, Lady Hale said in paragraphs 67 to 70:

> *" … to the extent that the duty to make reasonable adjustments requires it, the employer is not only permitted but obliged to treat a disabled person more favourably than others."*

Burden of proof in complaints under the Equality Act

139. Sections 136(2) and (3) provide for a shifting burden of proof:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) This does not apply if A shows that A did not contravene the provision."*

140. This means that if there are facts from which the tribunal could properly and fairly conclude that there has been unlawful discrimination, the burden of proof shifts to the respondent.

141. If the burden shifts to the respondent, the respondent must provide an "adequate" explanation, which proves on the balance of probabilities that the respondent did not fail to make reasonable adjustments.

142. The respondent would normally be expected to produce "cogent evidence" to discharge the burden of proof. If there is a prima facie case and the explanation for that treatment is unsatisfactory or inadequate, then it is mandatory for the tribunal to make a finding of discrimination.

Jurisdiction – time limits

143. Section 123 of the Equality Act says:

> *"(1) Subject to section 140B [extension for ACAS early conciliation] proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *…*
>
> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> *(a) when P does an act inconsistent with doing it, or*
>
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

Conclusions

144. We apply these legal principles to the facts as we have found them to reach our conclusions on the issues for decision by us. We have started with the questions of whether the claimant was disabled and if so when. We then go on to consider whether and when the respondent knew about the claimant's disability.

Disability

145. The claimant had some back pain in 2017. We did not have any evidence of the effect of the claimant's back pain on his day to day activities at this time, or on the likelihood of recurrence of any such effects, so that we could decide that the claimant had a disability within the meaning of section 6 at this time.

146. From July 2020 the claimant had consistent back pain which was likely to have been caused by a disc protrusion impinging on a nerve. This amounted to a physical impairment.

147. We have found that the claimant's pain was worsening from July 2020. His GP said that he became increasingly debilitated. We have accepted that the claimant's

back pain adversely affected his day to day activities, including cooking, cleaning, sitting and lifting shopping bags.

148. We have to decide when these effects became more than minor (and were therefore substantial). We have concluded that by November 2020 the claimant's back pain was having a substantial adverse effect on his day to day activities. We reach this conclusion based on the report of the claimant's NHS physiotherapist dated 25 November 2020 which refers to the effect of the claimant's back pain on his daily life being significant.

149. Further, the claimant had prescription painkillers from September 2020 and he was regularly taking them in 2021. We conclude that if he had not been taking painkillers the adverse effects on his day to day activities would have been more substantial.

150. Finally, we have to decide whether these effects were long term. By November 2020 the claimant had been experiencing some effects for about five months. In November 2020 he was regularly having to visit his GP about his back pain. We have decided that by 25 November 2020, the significant effects of the claimant's back pain on his day to day activities were likely to last for 12 months, especially without the beneficial effect which the claimant's medication was having.

151. We have concluded therefore that the claimant's back pain met the definition of a disability within the meaning of section 6 of the Equality Act 2010 by 25 November 2020 because as at that date, it had substantial adverse on his day to day activities and these effects were likely to last for 12 months.

Respondent's knowledge of the claimant's disability

152. We have concluded that the respondent did not know that the claimant was disabled on 25 November 2020. It had a lot of medical information about the claimant but no advice that the claimant could be considered to be disabled within the meaning of the Equality Act.

153. However, from 25 June 2021 the respondent knew (or ought to have known) that the claimant was disabled within the meaning of section 6. This is because:

153.1. the respondent's OH advisor gave advice in the report on that date that the claimant was likely to be disabled; and

153.2. by that date, the respondent was aware that the claimant had been experiencing problems with his back since 6 July 2020, approaching 12 months earlier, and it should have given consideration in any event because of the possibility that his back condition might be long term and meet the definition of disability.

154. Prior to this date, the respondent did not have any evidence from which it could have concluded that the claimant's back pain was likely to last for 12 months.

Reasonable adjustments

155. PCP 1 and PCP 2: The respondent applied these PCPs. It imposed a requirement on the claimant to perform particular roles and to be able to perform a minimum of four tasks. (The complaint 'PCP1' appears to us to be better framed as a PCP, rather than as a physical features complaint. This may be because the alternative basis of the claim was added at a later stage in proceedings and was not the parties' focus.)

156. The respondent was not under a duty to make reasonable adjustments to the roles the claimant was required to perform prior to 25 June 2021 because the respondent did not know about the claimant's disability before that date.

157. From 25 June 2021, the requirement to perform the roles in the cockpit area and to add a fourth role disadvantaged the claimant. The cockpit roles caused him pain and he had to rely on painkillers. Because of the pain he experienced with his back, he struggled to perform another role. These were substantial disadvantages compared with someone without the claimant's disability.

158. The claimant's managers knew or could reasonably have been expected to know of the disadvantages the claimant was under, because:

158.1. the respondent's OH adviser reported in June 2021 that aspects of his role were exacerbating long standing back issues and that lighter duties should be considered;

158.2. the respondent's physiotherapist reported in October 2021 that the claimant was working on three cockpit roles and taking painkillers to manage his pain;

158.3. the claimant's GP wrote to the respondent in February 2022 to ask for a change of duties for the claimant.

159. The respondent was therefore under a duty from 25 June 2021 to make adjustments to the roles the claimant was required to perform.

160. The claimant has identified at least four roles in rework which would have been less strenuous. Make up roles were also suggested by the respondent's physiotherapists. The claimant asked to be moved to other roles and continued to do ask for a suitable role in absence management meetings up to and including 15 March 2023. The claimant has suggested that restricting his required roles to three instead of four would have also been a reasonable adjustment.

161. The claimant has established that he was substantially disadvantaged by being required to perform the cockpit roles and to identify a fourth role. As he has suggested possible adjustments, the burden shifts to the respondent to satisfy us that it has not failed to make reasonable adjustments.

162. The respondent has not met this burden.

163. The claimant was required to remain in the cockpit area on the three tasks he was performing, and the respondent continued to carry out assessments to see if he could work on a fourth task (in July 2021 and May 2022 for example), rather

than moving him to another role which would not cause him pain. The respondent did not consider the rework or make up roles for the claimant. Its managers felt that they had already done enough for the claimant by considering different roles in assembly. It would have been reasonable for the respondent to move the claimant to a role which was less physically demanding at some stage between 25 June 2021 and 15 March 2023.

164. The respondent could also have relaxed the usual requirement for a minimum of four tasks.

165. The respondent has not satisfied us that there were no suitable alternative roles available for the claimant. The claimant could have been moved to any of the rework or make up roles which the respondent accepts could have been suitable for him. We have not been provided with cogent evidence that there was no vacancy in any of these roles at any time during the period from 25 June 2021 to 15 March 2023. The respondent has asserted that other medically restricted employees were in these roles. That is unsupported by other evidence. It does not seem likely that there would have been no vacancy in any of these roles over the whole period, when the respondent has only 10 permanent employees on medical restrictions.

166. The respondent could reasonably have been expected to move the claimant to other roles as advised by its OH advisor and as requested by the claimant's GP. The respondent failed to do so. This failure was ongoing from 25 June 2021 until 15 March 2023, as the claimant was continuing to request a move to other suitable adjusted duties throughout this period.

167. The complaints of failure to make reasonable adjustments based on PCPs 1 and 2 succeed.

168. In relation to PCP3, we have found that the respondent did not take steps in response to what the claimant and his doctors were saying about his back condition, but we have not found that the respondent had a practice of not engaging with the claimant or his doctors in relation to identifying suitable duties. The respondent's physiotherapist contacted the claimant's GP for example to discuss the claimant. The complaint of failure to make reasonable adjustments based on PCP3 does not succeed.

<u>Direct disability discrimination</u>

169. The claimant makes two complaints of disability discrimination. The first is in relation to the dismissal.

170. The dismissal of the claimant was unfavourable treatment.

171. We have found facts from which we could conclude that the dismissal was because of the claimant's disability of back pain. These are:

171.1. Mr Darvill told the claimant that the respondent could not just take an associate's word for it that they have a back problem, and they can only take this more seriously when they have a medical report with an MRI scan.

171.2. The respondent felt it had 'bent over backwards' for the claimant even though it had failed over a lengthy period to provide the claimant with lighter duties as recommended by its OH advisor and the claimant's GP, and as recommended by paragraph 6.33 of the EHRC Code of Practice; and

171.3. The respondent formed a view that the claimant was not being honest about his symptoms and the respondent's managers took the highly unusual step of obtaining covert surveillance to test their view, without speaking to the claimant about their suspicions, and while at all times the respondent's physiotherapists accepted that he was unfit for work.

172. We could infer from these facts that the respondent's managers had a level of distrust or hostility towards associates with back conditions, and were unwilling to take their word for it that they had a back problem, or were quick to conclude that a person with a back condition was not being honest about their symptoms. We could infer that the respondent would not have formed the same view of an employee who had another health condition.

173. The burden of proof shifts to the respondent to satisfy us that the claimant's dismissal was in no sense whatsoever, whether consciously or subconsciously, because of his back condition. The respondent had not met this burden.

174. We have found that the respondent made assumptions about what the claimant had told them about his ability to walk and about the G4S surveillance film. Mr McCabe accepted that the claimant was fraudulently claiming sick pay. However, this was not supported by the evidence of the respondent's physiotherapists (and the claimant's GP) that at no time while he was on sick leave was the claimant fit for work. He was entitled to be on sick leave. The view reached by Mr McCabe was also inconsistent with the fact that the claimant was not, at the time of the covert surveillance or at the time of his dismissal, in receipt of sick pay (either company sick pay or statutory sick pay). Mr McCabe has not provided a cogent explanation as to why he concluded that the claimant had been fraudulently claiming sick pay.

175. We have concluded that the respondent has not met the burden of satisfying us that the decision to dismiss him was not because of his back condition. The claim of direct discrimination in relation to dismissal succeeds.

176. The second complaint of direct discrimination was described in the list of issues as repeatedly failing to properly consider or engage with the claimant or his doctors about suitable work and his back condition. This complaint is better understood as a complaint of failure to make reasonable adjustments in relation to the claimant's role. That complaint has succeeded.

<u>Discrimination arising from disability</u>

177. We have not considered the complaint about dismissal as a complaint under section 15, because it has succeeded as a complaint of direct disability discrimination under section 13.

178. The other complaint under section 15 concerns the attendance warning issued to the claimant in January 2022. This amounted to unfavourable treatment. It

meant that the claimant was under a review period for 12 months. It was a step on the sickness absence procedures which meant the claimant was at greater risk of dismissal.

179. The attendance warning was issued because of the claimant's absences in 2020 and 2021. The meeting was prompted by the most recent sickness absence which was the claimant's absence in December 2021. The claimant's absence because of back pain on that occasion was one of the reasons Mrs Reed decided to issue an attendance warning (along with earlier absences).

180. The December 2021 absence was because of back pain and was something arising in consequence of the claimant's disability. Therefore the unfavourable treatment was because of something which arose in consequence of disability.

181. The respondent relied on prevention of fraudulent sick pay claims and/or the management of long-term sickness absence and/or the management of workforce and adherence to appropriate standards of conduct. We accept that these are legitimate aims.

182. However, we do not accept that issuing an attendance warning to the claimant in January 2022 because of his sickness absence in December 2021 was a proportionate means of achieving those aims. This is because the warning was issued at a time when we have found that the respondent failed to make reasonable adjustments for the claimant by failing to provide him with suitable adjusted duties. If suitable adjusted duties had been provided for the claimant he may not have needed to take sickness absence for back pain.

183. Therefore the issue of the attendance warning was not a proportionate means for the respondent to achieve its legitimate aims. It would have been proportionate for the respondent to have provided the claimant with adjusted duties in line with its duty to make reasonable adjustments.

184. The issue of the attendance warning (and the sickness absence which was something arising from disability) took place at a time when the respondent knew that the claimant had the disability.

185. This complaint succeeds under section 15.

<u>Jurisdiction – time point</u>

186. The Claimant commenced ACAS Early Conciliation on 5 August 2023. The ACAS Early Conciliation certificate was issued on 16 September 2023. The claim was presented on 12 October 2023.

187. This means that any conduct on or after 6 May 2023 was in time, taking into account the primary time limit of three months less one day, and the extension for the period of ACAS early conciliation.

188. The complaints of discrimination which we have found have succeeded are:

188.1. A failure to make reasonable adjustments during the period from 28 June 2021 to 15 March 2023. The claimant continued to request a suitable role up to

15 March 2023. We have concluded that the respondent might reasonably have been expected to make adjustments to the claimant's duties during the whole of this period (section 123(4)(b));

188.2. issuing an attendance warning. This occurred on 19 January 2022;

188.3. dismissing the claimant on 26 May 2023. This complaint was brought within the primary time limit as extended for ACAS early conciliation, and is in time under section 123(1)(a).

189. We have decided that the failure to make reasonable adjustments and the issuing of the attendance warning on 19 January 2022 were part of a course of conduct extending over a period together with the dismissal, and this conduct is treated as done at the end of the period, on 26 May 2023 (section 123(3)(a)).

190. We have reached this conclusion because:

190.1. There is an overlapping timeframe in relation to the first two complaints, and the time between the end of the failure to make adjustments and the dismissal hearing is not substantial.

190.2. Mr Patel, the respondent's HR manager, was involved with both the attendance warning, the surveillance instruction and the dismissal. The issue of the attendance warning was related to the failure to make adjustments.

190.3. Mr Darvill was involved with the failure to make adjustments during the claimant's absence, as well as the surveillance instruction.

191. This means that all the complaints which have succeeded are in time.

<u>Unfair dismissal</u>

192. The parties agree that the claimant was dismissed by the respondent.

193. The effective date of termination was 26 May 2023, not 21 July 2023.

194. We have found that the respondent's appeals procedure provided for dismissal not to be implemented prior to the appeal being completed. However, despite what the procedure said, that is not what happened in this case. The claimant's employment terminated on 26 May 2023. This is clear because:

194.1. The claimant's termination letter said that the claimant's employment terminated on 26 May 2023;

194.2. The termination letter did not mention any possibility of his employment being revived or reinstated during an appeal;

194.3. The claimant was not told at the time he appealed that a consequence of his appeal being accepted was that his employment would be revived or reinstated pending his appeal;

194.4. The claimant was not told at any point after 26 May 2023 that he remained subject to his terms and conditions of employment pending his appeal;

194.5. The claimant did not receive his basic pay pending his appeal;

194.6. After the appeal the claimant was told that the deadline to bring an employment tribunal complaint would run from the date of the 'original hearing', meaning the respondent treated 26 May 2023 as the effective date of termination.

195. The reason or principal reason for the claimant's dismissal was a reason related to the claimant's conduct. Mr McCabe had believed that the claimant had fraudulently claimed sick pay. The other reasons relied on by the respondent do not add anything to this first allegation. In relation to the unacceptable levels of absence and failure to fulfill the contract of employment, the respondent did not rely on capability as a reason for dismissal.

196. At the time Mr McCabe formed his view, he did not have reasonable grounds for his belief. In particular:

196.1. There was no evidence that the claimant was fit for work. The respondent accepted that the claimant was not fit for work at the time he was subject to surveillance (and indeed at all times he was certified unfit for work by his GP). As the claimant was entitled to sick leave and sick pay, he could not have made a fraudulent claim for sick pay;

196.2. In any event, the claimant was not in receipt of sick pay at the time of the surveillance, therefore could not be fraudulently claiming sick pay.

197. Even if the respondent meant to say that the claimant had dishonestly exaggerated the extent of his symptoms, the respondent did not have reasonable grounds for that belief when the information provided by the claimant about the effect of his back condition on his ability to walk which was available to the respondent at the disciplinary hearing is viewed fairly and as a whole. The claimant had not said he was unable to walk more than a short distance. He had said walking a short distance caused pain, dizziness and feeling sick, but that those treating him had advised him to push through the pain.

198. The respondent failed to carry out as much investigation as was reasonable in the circumstances. It failed to properly review what the claimant had said about his back pain and the impact on walking. It failed to properly consider whether the claimant was in receipt of sick pay, wrongly concluding that he was. Mr McCabe failed to turn his mind to the question of how, if the respondent accepted that the claimant was unfit for work, any claim for sick pay could have been fraudulent.

199. The respondent failed to ask the claimant about any of its concerns prior to the disciplinary hearing. There was no separate investigation. The claimant's account of his pain was not challenged at his physiotherapy appointments (because the physiotherapists accepted his accounts of his pain). A reasonable employer would have put its concerns to the claimant at an investigation hearing or in a physiotherapy appointment. The physiotherapist's discussion with Mr Darvill about

the claimant's health which led to the surveillance was without the claimant's consent, as the claimant had only consented to written reports to be provided to the employer, provided a copy was sent to him at the same time.

200. These fundamental procedural failures took the decision to dismiss outside the range of reasonable responses. A reasonable employer would have made further investigations into these issues and would have considered more carefully what it was alleging the claimant to have done wrong and whether it was fair to put the concerns properly to the claimant before the disciplinary hearing.

201. The respondent's failure to notify the claimant of the date of his first appeal hearing was also outside the range of reasonable responses. The claimant had been dismissed and had not been told that he remained subject to the respondent's terms and conditions and required the respondent's permission to go abroad. The claimant had told the respondent that he would be away.

202. The decision to proceed with the second appeal after the claimant was unaware of the first appeal and was not able to attend the second deprived the claimant of an opportunity to put his case about the alleged fraud to another decision maker. A reasonable employer in these circumstances would have allowed the claimant a proper opportunity to attend an appeal.

203. The complaint of unfair dismissal succeeds.

204. We have not considered whether the claimant contributed to his dismissal by his conduct and/or would he have been fairly dismissed in any event (Polkey). These matters will be considered as part of the remedy hearing.

<u>Wrongful dismissal</u>

205. We have found that the claimant's conduct was the reason for his dismissal.

206. The conduct in question did not amount to a fundamental breach of contract entitling the respondent to summarily dismiss the claimant:

206.1. The claimant was not at any time fit for work when he said he was not, therefore he was entitled to be on sick leave and was not fraudulently claiming sick pay;

206.2. At the time of the surveillance, the claimant was not in receipt of sick pay and therefore was not fraudulently claiming sick pay;

206.3. We have found that the claimant did not dishonestly exaggerate the effect of his symptoms on walking. The respondent did not properly listen to what the claimant was saying about his walking ability, and jumped to conclusions based on the nature of his condition.

207. The complaint of wrongful dismissal succeeds.

208. The claimant's claim having succeeded in part, a remedy hearing will be arranged. Case management orders for that hearing will be sent separately.

Approved by:
Employment Judge Hawksworth

Date: 27 June 2025

Sent to the parties on: .4 July 2025.....

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For the Tribunals Office

Appendix – list of issues on liability

1. THE CLAIMS

1.1. The Claimant brings the following claims:

1.1.1. Unfair dismissal (section 98(4) Employment Rights Act 1996);
1.1.2. Direct discrimination (section 13 Equality Act 2010);
1.1.3. Discrimination arising from disability (section 15 EqA);
1.1.4. Failure to make reasonable adjustments (sections 20-21 EqA);
1.1.5. Wrongful dismissal;
1.1.6. Holiday pay – withdrawn.

2. UNFAIR DISMISSAL

2.1. The parties agree that the Claimant was dismissed by the Respondent.

2.2. What was the effective date of termination? The Claimant says that it was 26 May 2023 and the Respondent says that it was 21 July 2023.

2.3. What was the reason or principal reason for dismissal? The Respondent says the principal reason was conduct, which is a potentially fair reason pursuant to section 98(2) ERA 1996. The Claimant states that the reasons given by the Respondent are not the real reasons for the dismissal and he was dismissed because of his disability or in the alternative a reason arising from his disability.

2.4. The Respondent's given reasons for dismissing the Claimant were that he allegedly exaggerated his back condition and this allegedly involved;

2.4.1. Fraudulently claiming company sick pay
2.4.2. Breakdown in trust and confidence
2.4.3. Gross misconduct
2.4.4. Unacceptable levels of absence
2.4.5. Failure to fulfil contract of employment

2.5. If the Tribunal finds that that the dismissal was by reason of conduct:

2.5.1. did the Respondent believe that the Claimant had done 2.4.3 above?
2.5.2. Did the Respondent have in its mind reasonable grounds upon which to sustain that belief?
2.5.3. At the stage at which it formed that belief on those grounds, at any rate at the final stage at which it formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

2.5.4. Did the Respondent act fairly in dismissing the Claimant for that reason having regard to the procedures it followed and all circumstances of the case?

2.5.5. Was the dismissal within the range of responses of a reasonable employer pursuant to section 98(4) Employment Rights Act 1996.

2.6. In the event that the dismissal is found to be procedurally or substantively unfair, did the Claimant contribute to his dismissal by his conduct (100% contribution) and/or would he have been fairly dismissed in any event (Polkey argument).

3. DISABILITY

3.1. Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Claimant asserts that he was disabled from 2017. The Tribunal will decide:

3.1.1. Did he have a physical impairment? The Claimant says that he was disabled by virtue of his back condition.

3.1.2. Did the impairment(s) have a substantial adverse effect on his ability to carry out day-to-day activities?

3.1.3. If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment(s)?

3.1.4. Would the impairment(s) have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

3.1.5. Were the effects of the impairment(s) long-term? The Tribunal will decide:

3.1.6. did they last at least 12 months, or were they likely to last at least 12 months?

3.1.7. if not, were they likely to recur?

4. JURISDICTION FOR EQUALITY ACT 2010 CLAIMS

4.1. The Claimant commenced ACAS Early Conciliation on 5 August 2023, he was issued ACAS Early Conciliation certificate on 16 September 2023 and submitted his ET1 on 12 October 2023.

4.2. Were the claims presented more than 3 months (plus any relevant early conciliation period), after any of the conduct complained of?

4.3. If so, did that conduct form part of a chain of continuous conduct which ended within 3 months (plus any relevant early conciliation period) of the claim form being presented?

4.4. If not, would it be just and equitable in the circumstances for the Tribunal to extend time pursuant to s.123(1)(b) of the Equality Act 2010, in relation to the conduct alleged?

5. DIRECT DISCRIMINATION

5.1. Did the Respondent subject the Claimant to the following less favourable treatment?

5.1.1. Dismissing the Claimant.

5.2. Did the Respondent subject the Claimant to the following:

5.2.1. Repeatedly failing as an organisation via his line manager (Amy Reed) or the absence manager (Richard Darvill) or HR resources to properly consider or engage with the Claimant, or adopting a policy to do this about:

5.2.1.1. the Claimant's protests about jobs he was assigned to as referred to in his grievance letter of 21 October 2020

5.2.1.2. the Claimant's complaints and submissions concerning his back condition(dated 21 October 2020, 29 October 2020, 19 January 2022, 21 January 2022, 12 May 2022 (via Union), 26 & 27 May 2023) ,

5.2.1.3. physiotherapy and OH recommendations (dated 14 July 2020, 23 July 2020, 28 July 2020, 8 September 2020, 15 September 2020, 30 September 2020, 28 October 2020, 1 December 2020, 27 May 2021, 14 June 2021, 28 June 2021, 19 May 2022), and/or

5.2.1.4. GPs requests (dated 14 September 2020, 8 October 2020, 5 November 2020, 19 January 2021, 19 May 2021, 17 June 2021, 1 February 2022, 3 November 2022) about unsuitable work?

5.2.1.5. The incident at work on 24 August 2022 where he collapsed and was taken to hospital

5.2.2. If so, did the above amount to less favourable treatment? The Respondent will say that all allegations which pre-date 5 May 2023 are out of time. The Claimant will say that the above treatment was a campaign/ regime and a continuing act so that the time limit runs from the last date in the sequence.

5.3. If so, did the treatment at para 5.2.1 amount to a policy held by the Respondent? If so, was that policy applied to the Claimant?

5.4. If so, in respect of this treatment, was the Claimant treated less favourably than a hypothetical comparator? The Claimant suggests that the hypothetical comparator should be a person with restrictions on their ability to work, other than by reason of a long term substantial medical condition, who asks the Respondent to respect those restrictions and complains when this is not done.

5.5. Was the Claimant's disability the reason for any less favourable treatment?

6. DISCRIMINATION ARISING FROM DISABILITY (SECTIONS 15 EqA)

6.1. Did the Respondent treat the Claimant unfavourably by issuing him with attendance warnings in January 2022?

6.2. The Respondent admits that it treated the Claimant unfavourably by dismissing the Claimant.

6.3. Did the following things arise in consequence of the Claimant's disability:

6.3.1. The Claimant's sickness absence;
6.3.2. His incapability to perform certain tasks as listed in 7.1.1.1. below on the assembly line; and
6.3.3. The Respondent's accusations about the genuineness of his illness.

6.4. Was the unfavourable treatment because of his sickness absence or incapability to perform certain tasks as listed in 7.1.1.1. below on the assembly line or because of the Respondent´s accusations about the genuineness of his illness?

6.5. Was the treatment a proportionate means of achieving a legitimate aim?

6.6. The Respondent relies on prevention of fraudulent sick pay claims and/or the management of long-term sickness absence and/or the management of workforce and adherence to appropriate standards of conduct.

6.7. The Tribunal will decide in particular:

6.7.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;
6.7.2. could something less discriminatory have been done instead;
6.7.3. how should the needs of the Claimant and the Respondent be balanced?

6.8. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? If disability is admitted or proven the Respondent denies that it had knowledge of the Claimant's disability at the material time.

7. REASONABLE ADJUSTMENTS (SECTIONS 20 & 21 EA)

7.1. Protection arises in relation to a "PCP", a provision, criterion or practice, and/or physical features. Did the following amount to protected PCPs and/or physical features (the Respondent says that these allegations are all out of time, do not amount to PCPs and/or physical features or the Respondent did not have them):

7.1.1. PCP1 - provision whereby Respondent directed the Claimant to perform particular roles in the period July 2020 until 26 May 2023 (note: Respondent claims EDT is 21 July 2023 after completion of the appeal process as per the collective agreement), as follows:

7.1.1.1. "Coolant On" – 6 July 2020
7.1.1.2. "Left hand under tray fit loose" – 7 September 2020
7.1.1.3. "Left Hand Under Tray Secure" – 9 September 2020
7.1.1.4. "Coolant On" – 29 September 2020
7.1.1.5. "Rear Bumper Right Hand" – 2 November 2020
7.1.1.6. "Wheel Arch Liner Fit RH" – 5 November 2020
7.1.1.7. "Front Spat and Sill Finisher RH" – 17 November 2020 6.1.1.8. Cockpit Area, sections 1-8 – from 3 February 2021

7.1.2. PCP2 - The requirement for Claimant to rotate between 4 assembly roles (excluding fuel fill);
7.1.3. PCP3 - The practice of not engaging with the Claimant or his doctors in relation to identifying suitable duties

7.2. Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability? The Claimant asserts that he was disadvantaged as follows:

7.2.1. PCP1 - he was unable to perform these roles and suffered pain and injury from performing these tasks.
7.2.2. PCP2 – the Claimant could not perform the required 4 roles and he suffered pain and injury from training on additional jobs.
7.2.3. PCP3 - when compared to an able-bodied person who can be directed to work anywhere without prior discussion/ consideration, whereas he suffered from such an approach.

7.3. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

7.4. What steps could have been taken to avoid the disadvantage? The Claimant suggests the following:

7.4.1.1. PCP1 - His normal roles until 6 July 2020: battery negative, headlights set (right), head light set (left) and fuel fill, or
7.4.1.2. other light duties in assembly, or
7.4.1.3. lights duties in paint shop, or
7.4.1.4. light duties in body shop, or
7.4.1.5. non-physically demanding duties in any part of the business

7.4.2. PCP2 - to allow him limit his work to 3 assembly role (excluding fuel fill)
7.4.3. PCP3 - An adjustment to address this would have been to plan his duties in consultation with him and taking into account available medical guidance

7.5. Was it reasonable for the Respondent to have to take those steps, and if so, when?

7.6. Did the Respondent fail to take those steps?

8. WRONGFUL DISMISSAL

8.1. The parties agree that the Claimant was dismissed by the Respondent without being given notice.

8.2. The Tribunal will need to determine:

8.2.1. Was the reason for the dismissal of the Claimant his conduct?
8.2.2. If so, did the conduct in question amount to a fundamental breach by the Claimant of his employment contract entitling the Respondent to terminate the contract summarily?